

ORIGINAL

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE

GENERAL COUNSEL
OF COPYRIGHT

AUG 19 1998

RECEIVED

In the Matter of)

ADJUSTMENT OF THE RATES)

FOR NONCOMMERCIAL)

EDUCATIONAL BROADCASTING)

COMPULSORY LICENSE)

Docket No. 96-6 CARP NCBRA

**REPLY OF SESAC, INC. TO PETITIONS TO MODIFY
OR TO SET ASIDE THE PANEL'S REPORT AND DETERMINATION**

As the Librarian is aware, SESAC is a settling party that did not participate in any of the litigated proceedings before the Panel after its settlement with NPR and PBS. SESAC therefore takes no position in reply to the substance or the merits of the Petitions to Modify or To Set Aside submitted by any of the non-settling parties.

Although SESAC settled its claim and was not a participant in any of the hearings before the CARP, SESAC has been involuntarily drawn back into this proceeding solely to the extent that it has become necessary to address and to attempt to correct what SESAC views as the Panel's entirely inappropriate reference (in footnote 10 of its Report, page 6) to SESAC's alleged share of music on Public Broadcasting.

In its Petition SESAC established that, in light of SESAC's absence from the hearings, the Panel's statement regarding SESAC — a statement that could be read to suggest that the CARP had determined what would have been the *central, contested issue* in any litigated proceeding between SESAC and the Public Broadcasters — represents an improper, damaging and unnecessary abridgement of SESAC's due process rights, unsupported in any record that SESAC had an opportunity to cross examine, that would chill future participants from entering into partial settlements of their claims before the Copyright Office.

For its Reply, SESAC wishes to briefly supplement the record in support of its Petition with two additional pieces of highly pertinent information.

First, SESAC respectfully directs the Librarian's attention to the absence of even a single reference by the non-settling parties in their Petitions to the Panel's statement regarding SESAC's music share on Public Broadcasting. The reason for this is evident, as SESAC demonstrated in its Petition to Modify — *i.e.*, the statement in footnote 10 regarding SESAC has no bearing whatever on a determination of any of the issues the Panel was ultimately required to decide, nor is it pertinent to any of the competing fee-setting methodologies that the non-settling parties continue to vigorously contest before the Librarian.

Relatedly — and significantly — SESAC has been advised that *none of the non-settling parties opposes in principle the relief requested in SESAC's Petition.*

In sum, based on the entire record, including now the post-CARP submissions of the non-settling parties to the Librarian, SESAC remains unaware of any opposition in principle to, or of any basis for denying, its Petition to Modify the Panel's Report.

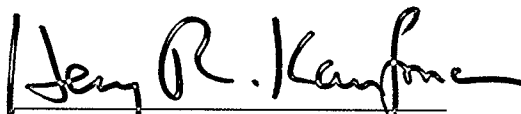
Accordingly, SESAC hereby repeats and renews its request that the Librarian grant SESAC's Petition by deleting the inappropriate reference to SESAC's purported music share in footnote 10 of the Panel's Report and by substituting for this improper reference the statement proposed at page 19 of SESAC's Petition, or any other neutral formulation that generally describes SESAC without retaining the inappropriate reference found in the Panel's Report to a specific, contested music use share that could not have been properly determined by the Panel in SESAC's absence.*

*SESAC has been advised that neither NPR-PBS nor ASCAP opposes the alternative formulation proposed by SESAC at page 19 of its Petition. Additionally, SESAC has been advised that BMI agrees in principle with SESAC's position that a settling party should not be bound in its absence by such a purported finding of the CARP. BMI may take the position, however, that the Panel's error can be corrected by simply adding a note to the effect that the statement in footnote 10 should be considered to have no future precedential effect. In this regard, we do not see how leaving (and thus implicitly affirming, or at least tolerating) such an insupportable statement in the Panel's Report, and then merely attempting to dilute its prejudicial effects by declaring the questionable statement of no precedential effect, solves the problem at hand. Neither does this half-hearted approach make any sense where, as here, there is no countervailing factor suggesting a need to retain the statement and therefore to work around it for some other articulable purpose necessary or germane to the Panel's determination of the issues actually before it for resolution with respect to the non-settling parties. Moreover, as BMI can doubtless appreciate, the limited comfort to be derived from a "no-precedent" clause — especially with respect to a purported finding made without a semblance of due process — is hardly to be equated with the *complete* protection that an absent, settling, but non-participating party should have the right to expect from an untested and uncross-examined finding of the kind included by the Panel in footnote 10 of its Report.

In this regard, SESAC also respectfully requests that the Register in her published Recommendations, and the Librarian in his Final Rule and Order, take care to avoid compounding the Panel's error by repeating, and thus more widely publishing, the specifics of the Panel's inappropriate statement regarding SESAC's alleged music share on Public Broadcasting.

Respectfully submitted,

SESAC, Inc.

A handwritten signature in black ink, reading "Henry R. Kaufman". The signature is written in a cursive style with a horizontal line underneath the name.

Henry R. Kaufman
SESAC, Inc.

421 West 54th Street, 4th Floor
New York, New York 10019
(212) 586-3450

August 19, 1998


CERTIFICATE OF SERVICE

I, Henry R. Kaufman, an attorney, hereby certify that I caused a copy of the foregoing Reply of SESAC, Inc. to Petitions to Modify or to Set Aside The Panel's Report and Determination of the Panel, dated August 19, 1998, Docket No. 96-6 CARP NCBRA, before the Copyright Arbitration Royalty Panel, United States Copyright Office, Library of Congress, to be delivered by overnight United Parcel Service (UPS) on this 19th day of August, 1998, to each of the parties listed on the attached service list.

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that the foregoing is true and correct.

Executed on August 19, 1998


Henry R. Kaufman

SERVICE LIST
Docket No. 96-6 CARP NCBRA

I. Fred Koenigsberg
Philip H. Schaeffer
J. Christopher Shore
Samuel Mosenkis
White & Case
1155 Avenue of the Americas
New York, New York 10036-2787
Phone: 212 819 8806
Fax: 212 354 8113
Counsel for ASCAP

Beverly A. Willett
ASCAP Building
Sixth Floor
One Lincoln Plaza
New York, New York 10023
Phone: 212 621 6289
Fax: 212 787 1381
Counsel for ASCAP

Joan M. McGovern
ASCAP
One Lincoln Plaza
New York, New York 10023
Phone: 212 621 6204
Fax: 212 787 1381

Gregory Ferenbach
Karen Rindner
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314-1698
Phone: 703 739 5000
Fax: 703 739 5358

Marvin L. Berenson
Joseph J. DiMona
BMI
320 West 57th Street
New York, New York 10019
Phone: 212 830 2533
Fax: 212 397 0789

Norman C. Kleinberg
Michael E. Salzman
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, New York 10004
Phone: 212 837 6000
Fax: 212 422 4726
Counsel for BMI

Neal A. Jackson
Denise Leary
Gregory A. Lewis
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: 202 414 2000
Fax: 202 414 3021

R. Bruce Rich
Jonathan T. Weiss
Mark J. Stein
Tracey I. Batt
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153-0119
Phone: 212 310 8000
Fax: 212 310 8007
Counsel For PBS and NPR